UNITED STATES OF AMERICA	)	
	)	**GOVERNMENT RESPONSE TO**
v.	)	**COURT'S CLARIFICATION OF**
	)	**RULING ON LIO MAX PUNISHMENTS,**
Manning, Bradley E.	)	**DATED 26 OCTOBER 2012**
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**16 November 2012**
Fort Myer, Virginia 22211	)	

The United States, by and through undersigned counsel, provides the following response to the issues presented by the Court in its Ruling Clarification, dated 26 October 2012.

The United States acknowledges that, to date, the Court has not published its ruling on proposed elements and instructions in this case. For the purposes of this response, the United States assumes the Court will instruct substantially in accordance with the elements proposed by the Government in Appellate Exhibit CLXIX.

Is the proffered plea a lesser included offense of the charged offense or does it contain amendments to the specification requiring Convening Authority approval to be a referred offense? *United States v. Morton*, 69 M.J. 12 (C.A.A.F. 2010).

The United States will address each "revised" specification separately. *See* Defense Revised Notice of Plea and Forum (hereinafter "Def. Not. of Plea"), dated 23 October 2012. In short, Specifications 2, 3, 5, 7, 9, 10, and 15 are valid lesser-included offenses. The remaining specifications contain amendments to the specification requiring general court-martial convening authority (GCMCA) approval to be a referred offense.

LAW

Article 79, Uniform Code of Military Justice (UCMJ), states that "[a]n accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein." UCMJ art. 79 (2012). To determine whether an offense is necessarily included in the offense charged, the Court of Appeals for the Armed Forces (CAAF) applies the "elements" test. *United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F. 2011); *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010). The elements test compares the statutory elements of each offense. "If all of the elements of offense X are also elements of offense Y, then X is [a lesser-included offense] of Y." *Jones*, 68 M.J. at 470. The greater and lesser offenses do not need to "employ identical statutory language." *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010). "Instead, the meaning of the offenses is ascertained by applying the 'normal principles of statutory construction.'" *Id.* (citing *Carter v. United States*, 530 U.S. 255, 263 (2000)). Under the elements test, the appropriate comparison is between the statutory elements of the offenses in question, not "to conduct proved at trial regardless of the statutory definitions." *United States v. Medina*, 66 M.J. 21, 25 (C.A.A.F. 2008) (quoting *United States v. Schmuck*, 489 U.S. 705, 716-17 (1989)).

Under Rule for Courts-Martial (RCM) 910, an accused may plead guilty by exceptions and substitutions. RCM 910(a)(1). A court-martial may enter findings by exceptions and substitutions, but "exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it." RCM 918(a)(1). Exceptions and substitutions that substantially change the nature of the offense are deemed a material variance. *United States v. Finch*, 64 M.J. 118, 121 (C.A.A.F. 2006). To find a material variance, the elements proven must be substantially different from those charged. *Id.* at 122. Changing the date or place of the offense may, but does not necessarily, change the nature or identity of an offense. RCM 918(a)(1) discussion.

In order for a court-martial to have jurisdiction over an offense, "[e]ach charge before the court-martial must be referred to it by a competent authority." RCM 201(b)(3). Referral is defined as the "order of a convening authority that charges against an accused will be tried by a specified court-martial." RCM 601(a). CAAF has held that when a convening authority refers a charge to a court-martial, any lesser-included offenses of that charge are referred with it, and need not be separately charged. *See United States v. Nealy*, 71 M.J. 73, 76 (C.A.A.F. 2012) (citing *United States v. Virgilito*, 47 C.M.R. 331, 333 (1973)). Additionally, CAAF has held that where a particular charge or specification was not referred to a court-martial, the court-martial lacks jurisdiction to enter findings over that charge or specification. *Nealy*, 71 M.J. at 76 (citing *United States v. Wilkins*, 29 M.J. 421, 424 (C.M.A. 1990)). Finally, CAAF has held that the convening authority's entry into a pretrial agreement that calls for pleas of guilty to offenses different from those charged is the "functional equivalent" to an order referring those offenses to a court-martial. *See United States v. Morton*, 69 M.J. 12, 16 n.7 (C.A.A.F. 2010) (quoting *Wilkins*, 29 M.J. at 424).

Based on the foregoing statement of the law, the Government believes the Court must determine whether the proffered specifications are, in fact, lesser-included offenses of the charged offenses, or whether the proffered specifications, utilizing exceptions and substitutions, substantially change the nature of the offenses such that the court-martial lacks jurisdiction to enter findings over a particular charge or specification. If the proffered specifications substantially change the nature of the offenses, the GCMCA must either refer or constructively refer (through entry into a pretrial agreement with the accused, for example) the proffered specifications. As such, the Government does not agree with the defense assertion that "the inquiry at hand is whether the specifications as pled substantially change the nature of the offenses and whether that change prejudices PFC Manning." Def. Not. of Plea, at 1. No one believes that the accused is prejudiced by a voluntary plea. The issue, in short, is the court-martial's jurisdiction in this case, and lack of jurisdiction cannot be waived by the accused. *See* RCM 905(e).

Specification 1 of Charge II

The revised Specification 1 of Charge II contains amendments requiring GCMCA approval to be a referred offense. *See* Def. Not. of Plea, at 1. The proffered specification is not a lesser-included offense of the charged offense because it is not necessarily included in the charged offense. The proffered specification substitutes words and phrases that substantially change the nature of the offense in that the original specification and the proffered specification

have entirely different elements. For example, the proffered specification requires the Court to find, *inter alia*, that the accused knew "that WikiLeaks might publish the information on the internet."

Specification 2 of Charge II

The revised Specification 2 of Charge II is a lesser-included offense of the charged offense. *See* Def. Not. of Plea, at 2. The proffered specification utilizes exceptions and substitutions that do not substantially change the nature of the offense. As such, the defense plea contains a subset of elements of the charged specification.

Specification 3 of Charge II

The revised Specification 3 of Charge II is a lesser-included offense of the charged offense. *See* Def. Not. of Plea, at 2. The proffered specification utilizes exceptions and substitutions that do not substantially change the nature of the offense. As such, the defense plea contains a subset of elements of the charged specification.

Specification 4 of Charge II

The revised Specification 4 of Charge II contains amendments requiring GCMCA approval to be a referred offense. *See* Def. Not. of Plea, at 3. The proffered specification is not a lesser-included offense of the charged offense because it is not necessarily included in the charged offense. For example, the proffered specification requires the Court to find that the accused "removed" records from a government facility for "an unauthorized purpose." The charged offense could be proven without necessarily establishing that the accused removed records from a government facility for an unauthorized purpose.

Specification 5 of Charge II

The revised Specification 5 of Charge II is a lesser-included offense of the charged offense. *See* Def. Not. of Plea, at 3. The proffered specification utilizes exceptions and substitutions that do not substantially change the nature of the offense. As such, the defense plea contains a subset of elements of the charged specification.

Specification 6 of Charge II

The revised Specification 6 of Charge II contains amendments requiring GCMCA approval to be a referred offense. *See* Def. Not. of Plea, at 3-4. The proffered specification is not a lesser-included offense of the charged offense because it is not necessarily included in the charged offense. For example, the proffered specification requires the Court to find that the accused "removed" records from a government facility for "an unauthorized purpose." The charged offense could be proven without necessarily establishing that the accused removed records from a government facility for an unauthorized purpose.

Specification 7 of Charge II

The revised Specification 7 of Charge II is a lesser-included offense of the charged offense. *See* Def. Not. of Plea, at 4. The proffered specification utilizes exceptions and substitutions that do not substantially change the nature of the offense. As such, the defense plea contains a subset of elements of the charged specification.

Specification 8 of Charge II

The revised Specification 8 of Charge II contains amendments requiring GCMCA approval to be a referred offense. *See* Def. Not. of Plea, at 4. The proffered specification is not a lesser-included offense of the charged offense because it is not necessarily included in the charged offense. For example, the proffered specification requires the Court to find that the accused "removed" records from a government facility for "an unauthorized purpose." The charged offense could be proven without necessarily establishing that the accused removed records from a government facility for an unauthorized purpose.

Specification 9 of Charge II

The revised Specification 9 of Charge II is a lesser-included offense of the charged offense. *See* Def. Not. of Plea, at 5. The proffered specification utilizes exceptions and substitutions that do not substantially change the nature of the offense. As such, the defense plea contains a subset of elements of the charged specification.

Specification 10 of Charge II

The revised Specification 10 of Charge II is a lesser-included offense of the charged offense. *See* Def. Not. of Plea, at 5. The proffered specification utilizes exceptions and substitutions that do not substantially change the nature of the offense. As such, the defense plea contains a subset of elements of the charged specification.

Specification 11 of Charge II

The revised Specification 11 of Charge II is a plea to an entirely different act. *See* Def. Not. of Plea, at 5. Specification 11 of Charge II is one of the various original specifications alleging misconduct in violation of 18 U.S.C. § 793(e). The exceptions and substitutions for Specification 11 are different than the other 18 U.S.C. § 793(e) offenses because the proffered specification dramatically changes the date of the offense. *See* Charge Sheet ("on or about 1 November 2009 and on or about 8 January 2010"). The Government agrees that if this case went to trial, the evidence would show that the accused communicated the video in question on the date proffered by the defense in its plea; however, the evidence also indicates that the video in question was originally communicated to unauthorized persons in the November/December 2009 timeframe. It is the first communication that is the subject of Specification 11 of Charge II. As such, the proffered specification substantially changes the nature or identity of the offense, requiring GCMCA approval for the court-martial to have jurisdiction.

Specification 12 of Charge II

The revised Specification 12 of Charge II contains amendments requiring GCMCA approval to be a referred offense. *See* Def. Not. of Plea, at 6. The proffered specification is not a lesser-included offense of the charged offense because it is not necessarily included in the charged offense. For example, the proffered specification requires the Court to find that the accused "removed" records from a government facility for "an unauthorized purpose." The charged offense could be proven without necessarily establishing that the accused removed records from a government facility for an unauthorized purpose.

Specification 13 of Charge II

The revised Specification 13 of Charge II contains amendments requiring GCMCA approval to be a referred offense. *See* Def. Not. of Plea, at 6. The proffered specification is not a lesser-included offense of the charged offense because it is not necessarily included in the charged offense. For example, the proffered specification requires the Court to find that the accused had "unauthorized possession" of a State Department cable. The charged offense could be proven without necessarily establishing that the accused had unauthorized possession of the State Department cable in question.

Specification 14 of Charge II

The revised Specification 14 of Charge II contains amendments requiring GCMCA approval to be a referred offense. *See* Def. Not. of Plea, at 7. The proffered specification is not a lesser-included offense of the charged offense because it is not necessarily included in the charged offense. For example, the proffered specification requires the Court to find that the accused had "unauthorized possession" of State Department cables. The charged offense could be proven without necessarily establishing that the accused had unauthorized possession of the State Department cables in question.

Specification 15 of Charge II

The revised Specification 15 of Charge II is a lesser-included offense of the charged offense. *See* Def. Not. of Plea, at 7. The proffered specification utilizes exceptions and substitutions that do not substantially change the nature of the offense. As such, the defense plea contains a subset of elements of the charged specification.

Assuming the Court accepts the proffered plea as a lesser included offense of the charged offense or the Convening Authority approves amendment of the specification, what is the maximum punishment for each specification in accordance with the accused's proffered plea IAW RCM 1003(c)(1)(B) and *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011)?

Specification 1 of Charge II

Pursuant to the Court's ruling dated 19 July 2012, Specification 1 of Charge II is not closely related to any offense listed in Part IV of the Manual for Courts-Martial, nor is it directly

analogous to an offense under the United States Code. *See* Court's Ruling on Lesser Included Offense Maximum Punishments, dated 19 July 2012. The Court ruled that the maximum punishment for Specification 1 of Charge II would be confinement for 2 years, a dishonorable discharge, and total forfeiture of all pay and allowances, because Army Regulation 380-5 established a custom of the service penalizing disclosures of classified and sensitive information, if the conduct was charged as a violation of Article 92, UCMJ. *See id.* Because the gravamen of the proffered specification is still a disclosure of government information to an unauthorized person or entity, the maximum punishment of the proffered specification should remain 2 years confinement, a dishonorable discharge, and forfeiture of all pay and allowances.

Specification 2 of Charge II

The proffered Specification 2 of Charge II is directly analogous to an offense under the United States Code; specifically, 18 U.S.C. § 793(e). The elements of the proffered specification and the federal statute are essentially the same. *See United States v. Beaty*, 70 M.J. 39, 43 (C.A.A.F. 2011) (discussing *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007)). Thus, the maximum punishment of the proffered specification should remain 10 years confinement, a dishonorable discharge, and forfeiture of all pay and allowances. The defense has essentially removed two phrases from the original specification: (1) "relating to the national defense," and (2) "reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation." *See* Def. Not. of Plea, at 2. However, under 18 U.S.C. § 793(e), the Government is not required to prove that the accused had reason to believe the information "could be used to the injury of the United States" when the accused had unauthorized possession of any "document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense." *See* 18 U.S.C. § 793(e). In other words, the "reason to believe" scienter requirement only applies to intangible information relating to the national defense, not the tangible items listed above. *See United States v. Kiriakou*, 2012 WL 4903319, at *1 (E.D. Va. Oct. 16, 2012) ("Importantly, § 793[e] differentiates between 'tangible' NDI, described in the 'documents' clause ('any document, ... or note relating to the national defense'), and 'intangible' NDI, described in the 'information' clause ('information relating to the national defense')."); *United States v. Rosen*, 445 F. Supp. 2d 602, 612 (E.D. Va. 2006) ("Second, Congress expanded the category of what could not be communicated pursuant to §§ 793(d) and (e) to include 'information relating to the national defense,' but modified this additional item by adding a scienter requirement....").

Specification 3 of Charge II

The proffered Specification 3 of Charge II is directly analogous to an offense under the United States Code; specifically, 18 U.S.C. § 793(e). The elements of the proffered specification and the federal statute are essentially the same. *See United States v. Beaty*, 70 M.J. 39, 43 (C.A.A.F. 2011) (discussing *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007)). Thus, the maximum punishment of the proffered specification should remain 10 years confinement, a dishonorable discharge, and forfeiture of all pay and allowances. The defense has essentially removed two phrases from the original specification: (1) "relating to the national defense," and (2) "reason to believe such information could be used to the injury of the United States or to the

advantage of any foreign nation." *See* Def. Not. of Plea, at 2. However, under 18 U.S.C. § 793(e), the Government is not required to prove that the accused had reason to believe the information "could be used to the injury of the United States" when the accused had unauthorized possession of any "document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense." *See* 18 U.S.C. § 793(e). In other words, the "reason to believe" scienter requirement only applies to intangible information relating to the national defense, not the tangible items listed above. *See United States v. Kiriakou*, 2012 WL 4903319, at *1 (E.D. Va. Oct. 16, 2012) ("Importantly, § 793[e] differentiates between 'tangible' NDI, described in the 'documents' clause ('any document, ... or note relating to the national defense'), and 'intangible' NDI, described in the 'information' clause ('information relating to the national defense')."); *United States v. Rosen*, 445 F. Supp. 2d 602, 612 (E.D. Va. 2006) ("Second, Congress expanded the category of what could not be communicated pursuant to §§ 793(d) and (e) to include 'information relating to the national defense,' but modified this additional item by adding a scienter requirement. ...").

Specification 4 of Charge II

The proffered Specification 4 of Charge II is closely related to Article 121, UCMJ. As such, the maximum punishment of the proffered specification should be 1 year confinement, a bad-conduct discharge, and forfeiture of all pay and allowances, because the property at issue is military property of a value of $500 or less.

Specification 5 of Charge II

The proffered Specification 5 of Charge II is directly analogous to an offense under the United States Code; specifically, 18 U.S.C. § 793(e). The elements of the proffered specification and the federal statute are essentially the same. *See United States v. Beaty*, 70 M.J. 39, 43 (C.A.A.F. 2011) (discussing *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007)). Thus, the maximum punishment of the proffered specification should remain 10 years confinement, a dishonorable discharge, and forfeiture of all pay and allowances. The defense has essentially removed two phrases from the original specification: (1) "relating to the national defense," and (2) "reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation." *See* Def. Not. of Plea, at 2. However, under 18 U.S.C. § 793(e), the Government is not required to prove that the accused had reason to believe the information "could be used to the injury of the United States" when the accused had unauthorized possession of any "document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense." *See* 18 U.S.C. § 793(e). In other words, the "reason to believe" scienter requirement only applies to intangible information relating to the national defense, not the tangible items listed above. *See United States v. Kiriakou*, 2012 WL 4903319, at *1 (E.D. Va. Oct. 16, 2012) ("Importantly, § 793[e] differentiates between 'tangible' NDI, described in the 'documents' clause ('any document, ... or note relating to the national defense'), and 'intangible' NDI, described in the 'information' clause ('information relating to the national defense')."); *United States v. Rosen*, 445 F. Supp. 2d 602, 612 (E.D. Va. 2006) ("Second, Congress expanded the category of what could not be communicated pursuant to §§ 793(d) and (e) to include

'information relating to the national defense,' but modified this additional item by adding a scienter requirement....").

Specification 6 of Charge II

The proffered Specification 6 of Charge II is closely related to Article 121, UCMJ. As such, the maximum punishment of the proffered specification should be 1 year confinement, a bad-conduct discharge, and forfeiture of all pay and allowances, because the property at issue is military property of a value of $500 or less.

Specification 7 of Charge II

The proffered Specification 7 of Charge II is directly analogous to an offense under the United States Code; specifically, 18 U.S.C. § 793(e). The elements of the proffered specification and the federal statute are essentially the same. *See United States v. Beaty*, 70 M.J. 39, 43 (C.A.A.F. 2011) (discussing *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007)). Thus, the maximum punishment of the proffered specification should remain 10 years confinement, a dishonorable discharge, and forfeiture of all pay and allowances. The defense has essentially removed two phrases from the original specification: (1) "relating to the national defense," and (2) "reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation." *See* Def. Not. of Plea, at 2. However, under 18 U.S.C. § 793(e), the Government is not required to prove that the accused had reason to believe the information "could be used to the injury of the United States" when the accused had unauthorized possession of any "document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense." *See* 18 U.S.C. § 793(e). In other words, the "reason to believe" scienter requirement only applies to intangible information relating to the national defense, not the tangible items listed above. *See United States v. Kiriakou*, 2012 WL 4903319, at *1 (E.D. Va. Oct. 16, 2012) ("Importantly, § 793[e] differentiates between 'tangible' NDI, described in the 'documents' clause ('any document, ... or note relating to the national defense'), and 'intangible' NDI, described in the 'information' clause ('information relating to the national defense')."); *United States v. Rosen*, 445 F. Supp. 2d 602, 612 (E.D. Va. 2006) ("Second, Congress expanded the category of what could not be communicated pursuant to §§ 793(d) and (e) to include 'information relating to the national defense,' but modified this additional item by adding a scienter requirement....").

Specification 8 of Charge II

The proffered Specification 8 of Charge II is closely related to Article 121, UCMJ. As such, the maximum punishment of the proffered specification should be 1 year confinement, a bad-conduct discharge, and forfeiture of all pay and allowances, because the property at issue is military property of a value of $500 or less.

Specification 9 of Charge II

The proffered Specification 9 of Charge II is directly analogous to an offense under the United States Code; specifically, 18 U.S.C. § 793(e). The elements of the proffered specification and the federal statute are essentially the same. *See United States v. Beaty*, 70 M.J. 39, 43 (C.A.A.F. 2011) (discussing *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007)). Thus, the maximum punishment of the proffered specification should remain 10 years confinement, a dishonorable discharge, and forfeiture of all pay and allowances. The defense has essentially removed two phrases from the original specification: (1) "relating to the national defense," and (2) "reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation." *See* Def. Not. of Plea, at 2. However, under 18 U.S.C. § 793(e), the Government is not required to prove that the accused had reason to believe the information "could be used to the injury of the United States" when the accused had unauthorized possession of any "document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense." *See* 18 U.S.C. § 793(e). In other words, the "reason to believe" scienter requirement only applies to intangible information relating to the national defense, not the tangible items listed above. *See United States v. Kiriakou*, 2012 WL 4903319, at *1 (E.D. Va. Oct. 16, 2012) ("Importantly, § 793[e] differentiates between 'tangible' NDI, described in the 'documents' clause ('any document, ... or note relating to the national defense'), and 'intangible' NDI, described in the 'information' clause ('information relating to the national defense')."); *United States v. Rosen*, 445 F. Supp. 2d 602, 612 (E.D. Va. 2006) ("Second, Congress expanded the category of what could not be communicated pursuant to §§ 793(d) and (e) to include 'information relating to the national defense,' but modified this additional item by adding a scienter requirement....").

Specification 10 of Charge II

The proffered Specification 10 of Charge II is directly analogous to an offense under the United States Code; specifically, 18 U.S.C. § 793(e). The elements of the proffered specification and the federal statute are essentially the same. *See United States v. Beaty*, 70 M.J. 39, 43 (C.A.A.F. 2011) (discussing *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007)). Thus, the maximum punishment of the proffered specification should remain 10 years confinement, a dishonorable discharge, and forfeiture of all pay and allowances. The defense has essentially removed two phrases from the original specification: (1) "relating to the national defense," and (2) "reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation." *See* Def. Not. of Plea, at 2. However, under 18 U.S.C. § 793(e), the Government is not required to prove that the accused had reason to believe the information "could be used to the injury of the United States" when the accused had unauthorized possession of any "document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense." *See* 18 U.S.C. § 793(e). In other words, the "reason to believe" scienter requirement only applies to intangible information relating to the national defense, not the tangible items listed above. *See United States v. Kiriakou*, 2012 WL 4903319, at *1 (E.D. Va. Oct. 16, 2012) ("Importantly, § 793[e] differentiates between 'tangible' NDI, described in the 'documents' clause ('any document, ... or note relating to the national defense'), and 'intangible' NDI, described in the 'information' clause ('information relating to the national defense')."); *United States v. Rosen*, 445 F. Supp. 2d 602, 612 (E.D. Va. 2006) ("Second, Congress expanded

the category of what could not be communicated pursuant to §§ 793(d) and (e) to include 'information relating to the national defense,' but modified this additional item by adding a scienter requirement....").

Specification 11 of Charge II

The proffered Specification 11 of Charge II is directly analogous to an offense under the United States Code; specifically, 18 U.S.C. § 793(e). The elements of the proffered specification and the federal statute are essentially the same. *See United States v. Beaty*, 70 M.J. 39, 43 (C.A.A.F. 2011) (discussing *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007)). Thus, the maximum punishment of the proffered specification should remain 10 years confinement, a dishonorable discharge, and forfeiture of all pay and allowances. The defense has essentially removed two phrases from the original specification: (1) "relating to the national defense," and (2) "reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation." *See* Def. Not. of Plea, at 2. However, under 18 U.S.C. § 793(e), the Goverument is not required to prove that the accused had reason to believe the information "could be used to the injury of the United States" when the accused had unauthorized possession of any "document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense." *See* 18 U.S.C. § 793(e). In other words, the "reason to believe" scienter requirement only applies to intangible information relating to the national defense, not the tangible items listed above. *See United States v. Kiriakou*, 2012 WL 4903319, at *1 (E.D. Va. Oct. 16, 2012) ("Importantly, § 793[e] differentiates between 'tangible' NDI, described in the 'documents' clause ('any document, ... or note relating to the national defense'), and 'intangible' NDI, described in the 'information' clause ('information relating to the national defense')."); *United States v. Rosen*, 445 F. Supp. 2d 602, 612 (E.D. Va. 2006) ("Second, Congress expanded the category of what could not be communicated pursuant to §§ 793(d) and (e) to include 'information relating to the national defense,' but modified this additional item by adding a scienter requirement....").

Specification 12 of Charge II

The proffered Specification 12 of Charge II is closely related to Article 121, UCMJ. As such, the maximum punishment of the proffered specification should be 6 months confinement, a bad-conduct discharge, and forfeiture of all pay and allowances, because the property at issue is non-military property of a value of $500 or less.

Specification 13 of Charge II

The proffered Specification 13 of Charge II is not closely related to any offense listed in Part IV of the Manual for Courts-Martial, nor is it directly analogous to an offense under the United States Code because the document at issue is owned by the Department of State and not the Department of Defense or an intelligence organization. *See* Charge Sheet. Army Regulation 380-5 establishes a custom of the service penalizing disclosures of classified and sensitive information, if charged under Article 92, UCMJ. *See* Court's Ruling on Lesser Included Offense Maximum Punishments, dated 19 July 2012. Because the gravamen of the proffered

specification is a disclosure of classified information to an unauthorized person or entity, the maximum punishment of the proffered specification should be 2 years confinement, a dishonorable discharge, and forfeiture of all pay and allowances.

Specification 14 of Charge II

The proffered Specification 13 of Charge II is not closely related to any offense listed in Part IV of the Manual for Courts-Martial, nor is it directly analogous to an offense under the United States Code because the documents at issue are owned by the Department of State and not the Department of Defense or an intelligence organization. *See* Charge Sheet. Army Regulation 380-5 establishes a custom of the service penalizing disclosures of classified and sensitive information, if charged under Article 92, UCMJ. *See* Court's Ruling on Lesser Included Offense Maximum Punishments, dated 19 July 2012. Because the gravamen of the proffered specification is a disclosure of classified information to an unauthorized person or entity, the maximum punishment of the proffered specification should be 2 years confinement, a dishonorable discharge, and forfeiture of all pay and allowances.

Specification 15 of Charge II

The proffered Specification 15 of Charge II is directly analogous to an offense under the United States Code; specifically, 18 U.S.C. § 793(e). The elements of the proffered specification and the federal statute are essentially the same. *See United States v. Beaty*, 70 M.J. 39, 43 (C.A.A.F. 2011) (discussing *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007)). Thus, the maximum punishment of the proffered specification should remain 10 years confinement, a dishonorable discharge, and forfeiture of all pay and allowances. The defense has essentially removed two phrases from the original specification: (1) "relating to the national defense," and (2) "reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation." *See* Def. Not. of Plea, at 2. However, under 18 U.S.C. § 793(e), the Government is not required to prove that the accused had reason to believe the information "could be used to the injury of the United States" when the accused had unauthorized possession of any "document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense." *See* 18 U.S.C. § 793(e). In other words, the "reason to believe" scienter requirement only applies to intangible information relating to the national defense, not the tangible items listed above. *See United States v. Kiriakou*, 2012 WL 4903319, at *1 (E.D. Va. Oct. 16, 2012) ("Importantly, § 793[e] differentiates between 'tangible' NDI, described in the 'documents' clause ('any document, ... or note relating to the national defense'), and 'intangible' NDI, described in the 'information' clause ('information relating to the national defense')."); *United States v. Rosen*, 445 F. Supp. 2d 602, 612 (E.D. Va. 2006) ("Second, Congress expanded the category of what could not be communicated pursuant to §§ 793(d) and (e) to include 'information relating to the national defense,' but modified this additional item by adding a scienter requirement....").

Respectfully Submitted,

JODEAN MORROW
CPT, JA
Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs, Civilian Defense Counsel, via electronic mail, on 16 November 2012.

JODEAN MORROW
CPT, JA
Assistant Trial Counsel